IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE.

CRIMINAL APPLICATION NO. 5716 OF 2004.

Mafatlal Finance Co.Ltd. ..Applicant.

vs.

1. Aminex Chemicals Ltd.
2. Shri Deepak M. Shah.
3. Shri Mahipat J. Shah
4. Shri Mehul M. Shah.
5. The State of Maharashtra. ..Respondents.

Shri S.V. Marwadi i/b M/s R.K.Associates for the applicant.

Shri Ishwar S. Balgannavar with Shri Vishwanath Talkute and R.H. Joshi for respondent Nos.2 to 4.

Shri A.S. Shitole, A.P.P. for the State.

CORAM: V.M. KANADE, J.
DATE : 7TH MARCH, 2005

ORAL ORDER:

1. This is an application by the applicant for condoning delay in filing application for leave to file an appeal. Brief facts necessary for the purpose of considering this application are as follows:

2. A complaint was filed by the applicant on 19.11.1997, being Criminal Case No. 559/S/2002 in the Court of Metropolitan Magistrate, 23rd Court. Esplanade, Mumbai. For the offence punishable under section 138 read with section 141 of the Negotiable Instruments Act, process was issued by the Magistrate, against respondent Nos. 1 to 4 on 4.12.197. The criminal complaint filed by the applicants was dismissed on 5.5.2003 for want of prosecution under

section 256 of the Code of Criminal Procedure. Application for restoration of the complaint was filed by the applicants before the Metropolitan Magistrate, 23rd Court, on 12.8.2003. On 7.12.2004 the Metropolitan Magistrate rejected the application for restoration. Thereafter, the present criminal application was filed for leave to appeal against the order of rejection of the complaint by the Magistrate dated 5.5.2003. Application for condonation of delay was filed along with criminal application for leave to file appeal and appeal against acquittal.

3. The learned Counsel appearing for the applicants referred to the roznama of the trial Court. He submitted that right from the date when the complaint was presented in the Court and its verification was recorded on oath on 19.11.1997, the complainant had diligently appeared in the Court. He submitted that on 20.4.2002, the Metropolitan Magistrate, 37th Court, Esplanade, had without any notice to the applicant and the accused had taken the case on board and had transferred it to the Court of Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai. He submitted that after the matter was transferred to 23rd Court, Esplanade, Mumbai, neither the complainant nor his Advocate was aware about the proceeding in the 23rd Court and as a result thereof, on the next 3 days they could not remain present and

on 5.5.2003, the Metropolitan Magistrate, dismissed the complaint under section 256 of the Code of Criminal Procedure. He submitted that the roznama dated 24.6.2002 showing that the complainant was present with his Advocate was wrongly recorded, when in fact, neither the complainant nor his Advocate was present. He submitted that when the matter did not appear on board for some time, a search was taken by his Advocate and they came to know in the first week of August 2003 that the matter was dismissed for default and, therefore, an application was made for restoration of the case. The said application remained pending before the Metropolitan Magistrate who, finally dismissed the application on 7.12.2004. He,therefore, submitted that delay is caused in filing the present application for leave to file appeal in this Court.

4. Learned Counsel appearing for the applicants has filed compilation of documents, judgments of the Supreme Court and of various High Courts. In the said compilation, office order No. 18/2002 dated 30.3.2002 has been annexed. The said office order deals with distribution of criminal cases under section 138 of the Negotiable Instruments Act among different Magistrates at various centres. In the said office order it is mentioned that the cases would be transferred police station- wise. arising out of

their jurisdiction and it should be placed before the same Metropolitan Magistrate exercising jurisdiction over the allotted police station., It was submitted that the present complaint did not fall within the jurisdiction of 23rd Court and the complainant was not aware about the transfer of criminal cases from 37th Court to 23rd Court of Metropolitan Magistrate, Esplanade, Mumbai. Learned Counsel for the applicant submitted that there was an error committed in making noting in the roznama dated 24.10.2002 which is recorded as under:

> "Complainant present with Advocate to file reply to application for substitution. Accused No.3 present to file application for exemption of Accused Nos. 2 and 4."

Learned Counsel for the applicant submitted that there was no question of filing reply byh the complainant to their application for substitution. He submitted that prior to the transfer of case from 37th Court to 23rd Court, on 14.12.2001, an application was filed by the applicant for substitution of the new representatives of the Company and an order was passed for other side to say. He submitted that in view of this order there was no occasion for the complainant to file reply to their own application for substitution,. He,therefore, submitted that on the said date, neither the complainant nor his advocate was present in the

Court. Learned Counsel for the complainant submitted that they came to know about the said order of dismissal of the complaint in August 2003 and immediately an application was preferred on 12th August 2003 which was decided on 7.12.2004. It was, therefore, submitted that delay was caused in filing application for leave to file appeal just because applicant was not aware that the matter was transferred from 37th Court to 23rd Court, Esplanade, Mumbai. When they came to know about dismissal of the complaint, immediately an application for restoration was filed in the said Court which remained pending for 1 year and 3 months and which was dismissed on 7.12.2004 and, therefore, there was delay of 532 days caused in filing the present application for leave to appeal. It was submitted that prior to transfer of case from 37th Court to 23rd Court the complainant had remained present almost on each and every day and on 2/3 dates when complainant was not present his advocate was present. Learned Counsel relied upon judgment of the Supreme Court inn the case of **Associated Cement Co.Ltd. vs. Keshvanand reported in 1998 Cri.L.J. 856**. He also relied upon judgment of the Supreme Court in the case of Mohd. Azeem vs. A Vankatesh & anr. reported in 2003 ALL MR (Cri.) 400 (S.C.). He also relied upon judgment of the learned Single Judge of this Court in the case of **Mahendra Indermal Borana vs. Anil Shankar Joshi and anr.**

reported in 2004(1) JD 372. He also relied upon judgment of Jammu and Kashmir High Court in the case of Saraswat Hire Purchase Co.Ltd. vs. Vipan Gupta reported in 2000 Bank.J.172.

5. Learned Counsel appearing for the respondent Nos. 2 to 4 has vehemently opposed the submissions made by the learned Counsel for the applicant. He raised preliminary objection regarding the affidavit filed by the applicant dated 16.12.2004 of Shri Nirag Sharma. He submitted that the affidavit filed by Shri Virag Sharma did not conform to the requirements of the affidavit and was in breach of the guidelines laid down by the Bombay High Court in Chapter VII of the Criminal Manual on the subject of Affidavit. It was submitted that the affidavit of Shri Sharma did not state his father’s name, age, profession etc. and even place of residence to clearly establish his identity. It was further submitted that the said affidavit also did not state as to which statements were true to his own knowledge and which statements were affirmed by him on information and belief. It was submitted that therefore, on this ground alone, criminal application for condonation of delay was liable to be dismissed. It is further submitted that the applicant had not produced any record to show that the said Virag Sharma was authorised by the Mafatlal Finance Ltd. and therefore, on this ground also the

said application is liable to be dismissed.

6. It was further submitted that the complaint was filed on or about 21.10.1997 and complainant No.2-Kavita Tolia never remained present except when her verification statement was recorded. It was further submitted that Vakalatnama was filed by M/s Manilal Kher Ambalal Co. and signed by one Prashant Lugade without mentioning the authority. No document was produced to show whether he was authorised to execute vakalatnama on behalf of Mafatlal Finance Ltd. Learned Counsel for the respondents submitted that reference made by the learned Counsel for the applicant to the wrong entry in the roznama recording presence of the complainant and his advocate was uncalled for as there was a presumption raised about the record maintained by the Court. In support of the said submission he relied upon a judgment of the Supreme Court in the case of State of Maharashtra vs. Ramdas Shrinivas Nayak reported in AIR 1982 SC 1249. He further submitted that the trial Court had adjourned the matter on 3 occasions and thereafter the complaint was rightly dismissed under section 256 of the Code of Criminal Procedure.

7. Learned Counsel appearing for the respondents submitted that the contentions made by the applicant in his application for condonation of delay was false

and the complainant had suppressed material facts and he had committed fraud on the Court. He submitted that in the roznama it is recorded by the Court that complainant and his advocate were present on 24.10.2002. He submitted that therefore, statement of the applicant that he was not aware of the transfer of the case from 37th Court to 23rd Court was palpably false. He further submitted that no particulars were given in the said ground as to who had taken search or when search was taken. He therefore submits that the said ground is very vague.

8. It was submitted that since the complainant-Company is a juridical person it was incumbent upon it to disclose full name, address of the person who had taken search of the case. It was submitted that no particulars were given in the ground deliberately in order to avoid negligence and carelessness of the officers of the company. Learned Counsel appearing on behalf of the respondents further referred to Ground (b) of the application for condonation of delay and submitted that reference made to the judgment of the Supreme Court in the case of Mohd. Azeem vs. A.Vankatesh & anr,. reported in 2003 ALL MR (Cri.) 400 SC was uncalled for as ratio of the said judgment was clearly not applicable to the facts of the present case. He invited my attention to the judgment in Mohd. Azeem’s case. It was further

submitted that the applicant has not approached this Court with clean hands and was trying to mislead this Court by making false averments in the application for restoration. He further submitted that the complainant has suppressed facts. He submitted that the company had suppressed the fact as to why enquiries were not made as to why matter had not appeared on daily board on 29.4.2002. It was further submitted that the complainant had suppressed the fact that on 24th June 2002 the complainant's Advocate was present in Court. It is submitted that therefore, suo-motu action was liable to be taken against the company for obtaining favourable order by suppressing true facts. The learned Counsel for the respondents relied on compilation of judgments. He relied upon 12 judgments and also annexed written submissions of the respondents which were filed in the trial Court.

9. I have heard the learned Counsel for the applicant and learned Counsel for the respondents at length. This is an application for condonation of delay in filing application for leave to file appeal in this Court. The admitted facts are that the criminal casee was transferred from 37th Court to 23rd Court on account of the Office Note issued by the Metropolitan Magistrate in which criminal cases were transferred to the respective Courts having jurisdiction over concerned police station. From the

perusal of the roznama it can be seen that on 19.11.1997 complainant was present. On 14.12.1997 process was issued. On 4.5.1998 and again on 17.8.1998 the Court was on leave. On the next date, on 18.1.1999 board was discharged. On the next date i.e. 7.6.1999 complainant was absent. Accused and his advocate were absent. Thereafter on 23.8.1999 on the next date, the Court was on leave and matter was adjourned to 4.2.2000. Thereafter, on 17.1.2000 the Court proceedings were stayed in view of the writ petition filed by the respondents in the High Court. Thereafter, writ petition filed by the respondents was dismissed by the High Courts and case was taken on board on 13.9.2000. Notices were issued to both the parties and matter was adjourned to 20.10.2000 . On the next date, i.e. 20.10.2000 complainant and his advocate was present.On the next date, on 9.4.2001 complainant was absent but his advocate was present. Again on 6.8.2001 since earlier representative had retired, an application for substitution of new representative was filed.

10. Thereafter, on 20.4. 2002 the case was taken up on board in view of the office note dated 18 of 2002 and it was transferred to 23rd Court, Esplanade, Mumbai. While transferring the case to 23rd Court, no notices were issued to both the parties. Thereafter, controversial noting dated 24.6.2002 reads as under:

> "Complainant present with advocate to file reply to the application for substitution. Accused No.3 present. Advocate present to file application for exemption of accused Nos. 2 & 4."

Without going into the facts as to whether the said noting is correct or not, it can be seen that there appears to be some ambiguity in recording the said noting. There was no question of complainant filing a reply to his own application for substitution. This creates a doubt regarding presence of the applicant and his advocate. On the remaining dates i.e. 24.10.2002, 31.1.2003, 27.3.2001 and 5.5.2003 complainant and his advocate were absent.

11. It is no doubt true that it was the duty of the complainant and his advocate to be diligent and to have taken search immediately to ascertain to which Court the matter was transferred or why matter did not appear on board., However, in my view, equally, duty is cast on the trial Court to ensure that the orders are not passed under section 256 of Cri.P.C. mechanically and/or arbitrarily, particularly when the matter was transferred from one Court to another it was the duty of the Magistrate to have issued the notices issued to both the parties before passing any order under section 256. The Magistrate ought to have considered that the complainant was diligent and

appeared in Court regularly when the matter appeared before 37th Court. Before passing order under section 256 of Cr.P.C., he could have given an opportunity to give their reply to the application filed by the accused for dismissal of the complaint. It is no doubt true that substantive right is created in favour of the accused after complaint is dismissed and that while considering application for condonation of delay, the Court has to consider whether sufficient cause has been shown by the complainant. There cannot be any dispute regarding ratio of the judgment on which reliance has been placed by the respondents as also by the applicant. However, application for condonation of delay ultimately will have to be decided on the facts and circumstances of each case and there cannot be a straight jacket formula which can be applied to the present case.

12. In my view, the roznama clearly shows that the case was transferred from one Court to another., It does appear that according to jurisdiction of the police station, case could not have been transferred to 23rd Court and possibly there was some confusion created after transfer of the case from one Court to another. The trial Court ought to have considered these facts while considering application for restoration,. However, now the Apex Court has held that the Magistrate has no power to review its earlier

order under section 256 of Cr.P. C.. Delay is, therefore, caused due to the fact that application which was filed for restoration of the case in the 23rd Court,Esplanade, Mumbai, has remained pending for 1 year and 3 months. In my view, sufficient cause has been shown by the applicant for condonation of delay. So far as submission made by the learned Counsel for the respondents regarding defects in the verification of the affidavit is concerned, it has been held time and again by the Supreme Court and this Court that it is curable defect and the said defect will not result in dismissal of the application for condonation of delay. Regarding submission of suppression of facts, as I have indicated above, applicant in the criminal application for leave to appeal has relied upon roznama and has pointed out that noting of 24.6.2002 is incorrect and there has been controversy on either side regarding the said noting. This cannot be considered as a disputed fact, though I have not held that the said noting is incorrect, in my view, this is some ambiguity in the said noting and benefit will have to be given to the applicant. The noting does not indicate who was present on behalf of the complainant, name of the complainant's Advocate.Further there was no question of complainant filing reply to his own application for substitution. In these circumstances, submission of the learned Counsel for the respondents about suppression of facts

cannot be accepted. Delay in filing application for leave to appeal is condoned. Criminal Application is allowed.